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| 10/099,797      | 03/15/2002  | Richard A. Hynes     | 4002-2968           | 3276             |

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EXAMINER

ROBERT, EDUARDO C

ART UNIT

PAPER NUMBER

3732

DATE MAILED: 08/03/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

10/099,797

Applicant(s)

HYNES, RICHARD A.

Examiner

Eduardo C. Robert

Art Unit

3732

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 23 May 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-50 is/are pending in the application.
- 4a) Of the above claim(s) 1-7, 12-40, 44, 45, 47, 49 and 50 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 8-11, 41 and 46 is/are rejected.
- 7) ☒ Claim(s) 42 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 15 March 2002 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Election/Restrictions***

Applicant elected Species III (Figure 3) with traverse on 6/4/04 and requirement was made Final on the Office action mailed on 2/22/05. Claims 1-7 and 12-41 were withdrawn from consideration as being directed to a non-elected Species. Applicant, in the amendment filed on 5/23/05, introduces new claims 41-50. It is noted that claim 44 does not read on the elected Species because it does not have a set screw. Claim 45 does not read on the elected Species because it does not have a mounting piece substantially circular. Claim 47 does not read on the elected Species because it does have screws having a medialized orientations. Claim 49 does not read on the elected Species because it does not have a multi-piece longitudinal support. Claim 50 does not read on the elected Species because it does not have at least one arm that is bent.

Thus, claims 1-7, 12-41, 44-45, 47, 49, and 50 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected Species, there being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in the reply filed on 6/4/04.

The requirement was made FINAL on 2/22/05.

### ***Drawings***

The drawings are objected to because they do not include certain reference signs mentioned in the description. 37 CFR § 1.84(f) states, "Reference signs not mentioned in the description shall not appear in the drawing and vice versa." The following reference signs is not included in the drawings: 41. Correction is required.

Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 8-11, 41, 43, and 48 are rejected under 35 U.S.C. 102(b) as being anticipated by Yuan et al. (U.S. Patent No. 5,437,669).

Yuan et al. disclose a system comprising a plurality of pedicle screws 30 spaced apart in two columns (see Figure 1); a longitudinal support or spinal rod 22 extending along a path between the columns (see Figure 1); cross supports 50, each support 50 having two ends and a U-shaped mounting bracket or mounting piece 52 attached midway between the ends and one end attached to one of the pedicle screws and the other end attached to another pedicle screw (see Figure 1). The mounting bracket 52 and the longitudinal support are attached. Mounting bracket have a yoke 51. The pedicle screws have a multi-axial cross support end receiver, e.g. the head of the pedicle screws can be place on different axis by rotating the whole screw, which includes the head, around the cross supports. Clearly, the embodiment of Figure 1 shows at least four pedicle screws. The cross supports 50 include what can be considered arms 53 and 54. Figure 1 shows that a portion of an arm connected to a screw and a portion of another arm connected to another screws are coplanar in a plane substantially non-parallel to the longitudinal support.

### ***Response to Arguments***

Applicant's arguments filed on 5/23/05 have been fully considered but they are not persuasive.

In response to applicant's argument that Yuan et al. do not disclose a mounting bracket attached midway between end of the cross support, it is noted the Yuan et al. clearly shows a cross support 50 having two ends with a mounting bracket attached midway between the ends as shown in Figures 1 and 2. It is noted that claim 8 does not claim that the "mounting bracket" is a separate piece from the cross support, it only requires a cross support having two ends and a

Art Unit: 3732

mounting bracket attached midway between the ends, thus clearly the embodiment shown by Yuan et al. clearly read on that.

In response to applicant's argument that Yuan et al. teaches away from the medial orientation and cross support structure disclosed in the application, it is noted that what is disclosed in the application is not patentable what is patentable is what is claimed. Moreover, it is noted that the law of anticipation does not require that the reference "teach" what the subject patent teaches, but rather it is only necessary that the claims under attack "read on" something in the reference. *Kalman v. Kimberly Clark Corp.*, 218 USPQ 781 (CCPA 1983). Furthermore, the manner in which a device is intended to be employed does not differentiate the claimed apparatus from prior art apparatus satisfying the claimed structural limitations. *Ex parte Masham*, 2 USPQ2d 1647 (1987).

In response to applicant's argument that Yuan et al. do not disclose the subject matter of claim 9, applicant's attention is directed to the rejection, above, where the examiner explained how Yuan et al. disclose the subject matter of claim 9.

In response to applicant's argument that Yuan et al. do not disclose portions of two arms coplanar in a plane substantially non-parallel to the longitudinal support, it is noted that Yuan et al. clearly disclose two arms coplanar in a plane substantially non-parallel to the longitudinal support, e.g. the two arms to the left of Figure 1 are coplanar in a plane which is non-parallel to the longitudinal support.

***Allowable Subject Matter***

Claim 42 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

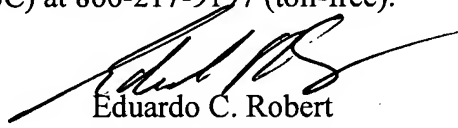
A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Eduardo C. Robert whose telephone number is 571-272-4719. The examiner can normally be reached on Monday-Friday, 9:30am-6:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo C. Robert can be reached on 571-272-4719. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Art Unit: 3732

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Eduardo C. Robert  
Primary Examiner  
Art Unit 3732

E.C.R.